



**MALAWI JUDICIARY**  
**IN THE SUPREME COURT OF APPEAL**  
**SITTING AT BLANTYRE**

**MSCA CIVIL APPEAL CASE NO. 52 OF 2019**

*(Being Commercial Case No. 337 of 2018, High Court Commercial Division, Blantyre Registry)*

**BETWEEN:**

**RMT INITIATIVE LIMITED t/a C-TRACK-----APPELLANT**

**AND**

**ELECTRICITY SUPPLY COMMISSION OF MALAWI-----RESPONDENT**

**CORAM : HON. CHIEF JUSTICE R.R. MZIKAMANDA SC**  
**HON. JUSTICE L.P. CHIKOPA SC, JA**  
**HON. JUSTICE F.E. KAPANDA SC, JA**  
**HON. JUSTICE H.S.B. POTANI JA**  
**HON. JUSTICE I.C. KAMANGA JA**  
**HON. JUSTICE M.C.C. MKANDAWIRE JA**  
**HON. JUSTICE D. MADISE JA**  
**HON. JUSTICE R. MBVUNDULA JA**  
**HON. JUSTICE D. Nya KAUNDA KAMANGA JA**  
Mr Kamkwasi, Counsel for the Appellant  
Absent, Counsel for the Respondent  
S. Wahabi, Judicial Research Officer  
Mrs. Namagonya/Msimuko, Court Reporter  
Mrs. Fundani/Mr K. Chinkono, Court Clerks

## **JUDGMENT**

**MKANDAWIRE JA,**

1. The appellant commenced this matter against the respondent in the court below on the 8<sup>th</sup> of October 2018. The appellant claimed for damages for breach of contract, K76,338,719.60 being special damages, damages on exemplary and aggravated footing and costs of the action.

2. After commencement of the matter, the case was due for mediation which was scheduled to take place on 25<sup>th</sup> January 2019 at 14.30 hrs. The appellant failed to arrive at the court premises on the scheduled time as a result the court seized of the matter dismissed it pursuant to Order 13 rule 6(1) of the Courts (High Court) (Civil Procedure) Rules 2017.

3. The appellant applied to the court below to have the matter restored pursuant to Order 13 rule 6(2) of the Courts (High Court) (Civil Procedure) Rules 2017. On the 28<sup>th</sup> of January 2019, the court below declined to grant an ex-parte application and ordered that the application be brought inter-parte on 2<sup>nd</sup> May 2019. After hearing the inter-parte application to restore the matter, the court below declined to grant an order restoring the matter on the grounds that it was wastage of court's time, counsel for the appellant having failed to appear on time during the scheduled time of the mediation session.

4. Aggrieved with the order of the court below, declining restoration of the matter, the appellant on 2<sup>nd</sup> of May 2020 filed a notice and grounds of appeal as follows:

- a) The Honourable Judge had a variety of penalties to impose before considering an ultimate sanction;
- b) It was the first incident in the proceedings that the claimant delayed and the court is not justified to impose the ultimate sanction;
- c) The claimant promptly applied for restoration of the matter to the cause list, showing seriousness to prosecute the matter;
- d) The Honourable Judge declined an ex-parte application to restore the matter on 28<sup>th</sup> of January 2019 and ordered an inter-parte hearing on 2<sup>nd</sup> of May 2019 and he is not justified to complain about wastage of time and resources in his order; and



e) The Honourable Judge did not consider the fact that the defendant did not object to the application and did not file any document in opposition.

5. When the matter came for hearing on 1<sup>st</sup> of October 2022, the respondent's counsel did not show up and no reasons were given for such a failure. The court noted that the respondent's counsel had also not filed skeleton arguments as required by Practice Direction No 1 of 2020. We therefore noted that even if the respondents had come for hearing on this day, we could not have granted them audience in view of their failure to file skeleton arguments.

6. Having gone through the grounds of appeal, we found that most of them did not comply with Order 111 rule 2 sub-rules 2,3 and 4 of the Supreme Court of Appeal Rules. This rule has elaborated how grounds of appeal have to be drafted. This court has made it very clear in its decisions as to how these grounds of appeal have to be crafted and the resultant consequences of non-compliance with Order 111 rule 2, see the cases of **Zinyemba t/a Tirza Enterprises v Toyota Malawi Limited**<sup>1</sup> and **Professor Arthur Peter Mutharika and Electoral Commission v Dr Saulos Klaus Chilima and Dr Lazarus Mc Carthy Chakwera**.<sup>2</sup> We therefore ordered that in view of such non-compliance, the appellant should only argue one ground of appeal which was the only properly drafted ground. In a nutshell, this is the ground which is anchored on Order 13 rule 6 of the Courts (High Court) (Civil Procedure) Rules 2017. This is the ground which says that the Honourable Judge did not consider rules of procedure and failed to exercise his discretion judiciously.

7. In arguing the appeal based on this single ground, counsel said the Judge did not consider rules of procedure and failed to exercise his discretion judiciously in terms of Order 13 rule 6. Counsel submitted that in respect of mediation, there are specific rules of procedure under Order 13 rule 6 that a Judge must consider if a party has not or has failed to attend mediation. One of them is the dismissal of the matter. But since it was the first incident, the Learned Judge should have considered a lessor assumption before it considered the ultimate assumption. Coming to general principles relating to failure by a party to take a particular step, counsel referred to the case of **Costellow vs Somerset County Council**<sup>3</sup>. The first principle in this case is that all rules are devised in public interest to promote expeditious dispatch of matters and this must be observed. The second principle which is in the form of a proviso is that the claimant should not be ordinarily be denied at adjudication of his

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<sup>1</sup>MSCA Civil Cause No. 6 of 2013

<sup>2</sup> MSCA Constitutional Appeal No. 1 of 2020

<sup>3</sup>(1933) 1WLR 256

or her claim on the merits merely because of procedural difference, default unless such default causes some prejudice to a party or other parties in the matter. In the present case, counsel referred the court to page 17 of the court record where he demonstrated that counsel for the respondent had no objections to the application before the Judge. This counsel said was a signal that the defendant was not prejudiced in any way. To buttress the point, counsel for the appellant said that even during hearing of the appeal, the respondent's counsel has not even filed a single document.

8. The appellant's counsel also referred to the case of **Robert Helliott Martin v Flore Suzgo Kamanga**<sup>4</sup>. In that case, Chikopa, SC, JA allowed a matter to be restored to the cause list, after the claimant had failed to attend court session on several occasions before the Judge in Zomba. During the hearing of the appeal at the Supreme Court, she was not even present and the Court proceeded to restore the matter.

9. Having gone through all the papers on record, it is clear that this matter is anchored on Order 13 rule 6 of the Courts (High Court) (Civil Procedure) Rules 2017. This Order provides as follows:

6-(1) Where it is not practical to conduct a scheduled mediation session because a party fails without good cause to attend within the time appointed for the commencement of the session, the Judge may-

(a) dismiss the claim where the non-complying party is a claimant, or strike out the defence, where the non-complying party is the defendant.

(b) order a party to pay costs; or

(c) make any other order that is deemed just.

10. The Order provides discretionary powers to the Judge as to what he or she can do. Having listened to the oral submission made by counsel for the appellant, we were of the view that there has been no scintilla of argument by the appellant to show that the trial Judge had abused his discretionary powers. We are also mindful of the fact that modern case management demands that parties to a matter should leave for court sessions or mediation sessions in good time so that they are not caught up in traffic jams as was the claim here by the appellant. In the absence of any argument

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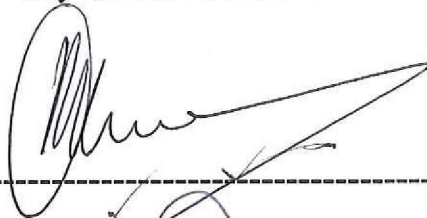
<sup>4</sup> MSCA Civil Appeal No. 34 of 2014



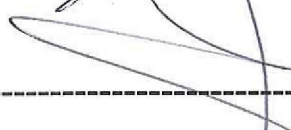
as to the abuse of discretionary powers by the Judge, this Court will always remain reluctant to interfere with such discretion.

**11.** We therefore find that there is no merit in this appeal, it is accordingly dismissed. We make no order as to costs.

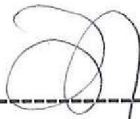
Made this 6<sup>th</sup> day of October 2022 at Blantyre



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**THE HON. CHIEF JUSTICE R.R. MZIKAMANDA SC**



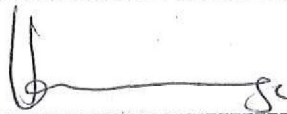
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**HON. JUSTICE L.P. CHIKOPA SC, JA**



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**HON. JUSTICE F.E. KAPANDA SC, JA**



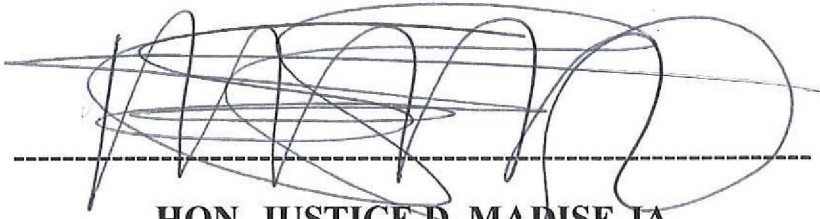
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**HON. JUSTICE H.S.B. POTANI JA**




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**HON. JUSTICE M.C.C. MKANDAWIRE JA**



**HON. JUSTICE D. MADISE JA**



**HON. JUSTICE R. MBVUNDULA JA**



**HON. JUSTICE D. Nya KAUNDA KAMANGA JA**

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